

§ 28.24

3600A(b). The covered evidence is sexual assault forensic examination kits under section 3600A(b)(1) and semen, blood, saliva, hair, skin tissue, or other identified biological material under section 3600A(b)(2).

(b) *Biological evidence under section 3600A(b)(2)*. Biological evidence within the scope of section 3600A(b)(2) is identified biological material that may derive from a perpetrator of the offense, and hence might be capable of shedding light on the question of a defendant's guilt or innocence through DNA testing to determine whether the defendant is the source of the material. In greater detail, evidence within the scope of section 3600A(b)(2) encompasses the following:

(1) *Identified biological material*. Beyond sexual assault forensic examination kits, which are specially referenced in section 3600A(b)(1), section 3600A requires preservation only of evidence that is detected and identified as semen, blood, saliva, hair, skin tissue, or some other type of biological material. Section 3600A's preservation requirement does not apply to an item of evidence merely because it is known on theoretical grounds that physical things that have been in proximity to human beings almost invariably contain unidentified and imperceptible amounts of their organic matter.

(2) *Material that may derive from a perpetrator of the crime*. Biological evidence within the scope of section 3600A(b)(2) must constitute "biological material." In the context of section 3600A, this term does not encompass all possible types of organic matter, but rather refers to organic matter that may derive from the body of a perpetrator of the crime, and hence might be capable of shedding light on a defendant's guilt or innocence by including or excluding the defendant as the source of its DNA.

Example 1. In a murder case in which the victim struggled with the killer, scrapings of skin tissue or blood taken from under the victim's fingernails would constitute biological material in the sense of section 3600A(b)(2), and would be subject to section 3600A's requirement to preserve biological evidence, assuming satisfaction of the statute's other conditions. Such material, which apparently derives from the perpetrator of the crime, could potentially shed light on

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guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether a defendant was the source of this material.

Example 2. Biological material in the sense of section 3600A(b)(2) would not include the body of a murder victim who was shot from a distance, the carcasses of cattle in a meat truck secured in an investigation of the truck's hijacking, a quantity of marijuana seized in a drug trafficking investigation, or articles made from wood or from wool or cotton fiber. While such items of evidence constitute organic matter in a broader sense, they are not biological material within the scope of section 3600A(b)(2), because they do not derive from the body of a perpetrator of the crime, and hence could not shed light on a defendant's guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether the defendant is the source of the evidence.

§ 28.24 Exceptions based on the results of judicial proceedings.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to the results of judicial proceedings:

(a) *Judicial denial of DNA testing*. Section 3600A(c)(1) exempts situations in which a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending.

(b) *Inclusion of defendant as source*. Section 3600A(c)(5) exempts situations in which there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence.

§ 28.25 Exceptions based on a defendant's conduct.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to action (or inaction) by the defendant:

(a) *Waiver by defendant*. Section 3600A(c)(2) makes the biological evidence preservation requirement inapplicable if the defendant knowingly and voluntarily waived DNA testing in a court proceeding conducted after the date of enactment, *i.e.*, after October 30, 2004. Hence, for example, if a defendant waives DNA testing in the context of a plea agreement, in a pretrial colloquy with the court, in the course of discovery in pretrial proceedings, or in a postconviction proceeding, and the proceeding in which the waiver occurs